ASA DIX LEGAL BRIEF

A PREVENTIVE LAW SERVICE OF THE JOINT READINESS CENTER LEGAL SECTION
UNITED STATES ARMY SUPPORT ACTIVITY DIX
KEEPING YOU INFORMED ON YOUR PERSONAL LEGAL NEEDS

WILLS

Q: WHAT IS A LAST WILL AND TESTAMENT? A Last Will and Testament (commonly referred to as a Will) is the legal document which controls the disposition of your property at death and may provide for guardianship for your minor children after your death. A Will is not effective until death. As long as you are living, your Will has no effect.

Q: CAN MY LAST WILL AND TESTAMENT BE CHANGED? Yes. Changes to a Will are made by drafting and executing a new Will or by adding a "Codicil." A Codicil is a supplement or addition to an existing Will that explains, modifies, or revokes a provision in the Will or adds an additional provision. It must be signed and executed in the same manner as your Will; a Codicil becomes part of the original Will. When a new Will is executed, it is advisable to destroy the old Will to avoid any confusion. NEVER MAKE ANY HANDWRITTEN CHANGES OR CORRECTIONS TO YOUR WILL without consulting an attorney. Changes on the face of your original WILL may make it invalid.

Q: WHAT IS MY LEGAL RESIDENCE? Your legal residence is the state in which you have your true, fixed, and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, and motor vehicle registration are some indicators of one's legal residence. If you are a citizen of the United States, you must be a legal resident of some state. You cannot be a citizen at large. If you are a naturalized U.S. citizen, you are considered to be a resident of the state in which you were naturalized.

Q: IS MY LEGAL RESIDENCE IMPORTANT WITH REGARD TO MY WILL? Yes. Your legal residence affects where your Will is probated and the amount of state inheritance or estate tax that may be paid at death.

Q: WHAT IS MY ESTATE? Your estate consists of all of your property and personal belongings you own or are entitled to possess at the time of your death. This includes real estate, personal property, cash, savings and checking accounts, stocks, bonds, automobiles, jewelry, etc. Although the proceeds of insurance policies may be considered part of your estate, a Will does not change the designated beneficiaries of an insurance policy, including SGLI; the proceeds will normally pass to the beneficiaries designated in the policy. In fact, a Will does not change the designated beneficiaries of any financial asset; the money in the account goes directly to that individual when you die, bypassing probate. Property owned as joint tenancy with right of survivorship does not become part of the estate and is not subject to probate fees; the other joint tenant will automatically get the entire property at the decedent's death. Likewise, certain bank accounts which are payable on death go directly to the beneficiary. This property and money passes to the person outside the probate proceeding. These devices are often used as a means of passing property outside the estate.

Q: TO WHOM SHOULD I LEAVE MY ESTATE? A person who receives or inherits your property, through a Will, is referred to as a "beneficiary." You may leave all of your property to one beneficiary, or you may divide your estate among several beneficiaries. You may designate in your Will that several different items of property or sums of money shall go to different persons. There are also different levels of beneficiaries: "Primary beneficiaries"- those who will inherit your property upon your death; and "Secondary beneficiaries"-

those who will inherit your property in the event the "Primary beneficiaries" die before you. You may want to also select a Third beneficiary in the event that both the Primary and Secondary beneficiaries do not survive you or predecease you.

Q: MAY A PERSON DISPOSE OF HIS OR HER PROPERTY IN ANY WAY? With some exceptions, you are generally free to give your property to whomever you desire. For example, in most states, a married person cannot completely "disinherit" or exclude a spouse. Spouses are entitled to part of the other spouse's estate, referred to as a "statutory share". This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide a "statutory share" of the estate to children of the decedent, thereby preventing them from being disinherited. If you have questions concerning the statutory share law in your home state, you should ask a Joint Base Legal Assistance Attorney.

Q: CAN I GIVE SPECIFIC THINGS TO SPECIFIC PEOPLE? Yes, you can make specific bequests in your Will by fully describing both what you want to give and the person who is to receive it. However, you should be careful about making specific bequests. If you dispose of the property that you describe in your Will before you die, or if there is any doubt about the exact property that you have described, you may be creating difficulties for your personal representative. Therefore, you should discuss with your attorney whether you should make specific bequests in your Will.

Q: SHOULD I NAME A GUARDIAN FOR MY MINOR CHILDREN IN MY WILL? Yes, it is advisable. A guardian is a person, institution, or agency appointed by a court to manage the personal affairs of minor children (or a special needs adult), when no parents survive or the one surviving parent is adjudged unable to care for his or her child(ren). Thus, a legal guardian is the person who will act as a parent(s) for any of your children who are minors at the time of your death. A guardian should be named in a Will to ensure that minor children and their estates are properly cared for. Although a court of law is not obligated to appoint the guardian you name in your Will, the court will certainly consider your choice and it places great weight on the parents' selection. You can also name a substitute guardian. This would provide a guardian for your children in the event that your spouse or other named guardian dies before you, or you and your spouse die at the same time.

Q: WHO SHOULD I NAME AS GUARDIAN FOR MY CHILDREN? You should choose your children's guardian (and alternate guardian) with extreme care. You should discuss the decision with both your spouse and the person you are thinking of naming as guardian; do not automatically assume that your parents or any other relative will be suitable guardians. In making your decision, you should consider such factors as the guardian's age, religion, financial situation, and current relationship with your children. Additionally, you and your spouse should agree on who should be guardian of your children. If you both die in a car accident and your Wills designated different guardians, then a court would have to decide who will be the children's guardian. This could cause undue hardship, both financial and emotional, on all the parties concerned.

Q: WHAT IS AN EXECUTOR? An executor (executrix, if female), also referred to as a personal representative, is the person who will manage and settle your estate, after your death, according to your Will. The executor, executrix, or personal representative collects your property, receives and pays claims against your estate, such as court costs, taxes, and debts, disputes any claims, and distributes your property according to your Will. You should also consider naming an alternate executor in the event that the named executor is unable or unwilling to act as executor of your estate. In your Will, you can require that your executor or substitute executor be required to post bond or other security, or you can waive this requirement, thereby saving expense to your estate. A bond is the executor's/executrix's promise to reimburse any loss to the estate as a result of his or her negligence or wrongdoing in carrying out his or her required duties.

Q: WHO SHOULD I CHOOSE AS MY EXECUTOR? Choose your personal representative or executor/executrix with care. Your personal representative will have an important role; therefore, you should

name someone you trust and in whom you have confidence. Many married people name their spouse as their personal representative. However, regardless of who you name, you should discuss the matter with him or her before you make your Will.

Q: HOW LONG IS A WILL VALID? A properly drawn and executed Will remains valid until it is changed or revoked. However, changes in circumstances after you execute your Will, such as tax laws, marriage/divorce, birth of children or even a substantial change in the nature or amount/value of your estate, can affect whether your Will is still adequate or whether your property will still pass in the manner you choose. All changes in circumstances require a careful analysis and reconsideration of the provisions of a Will and may make it wise to change the Will, with the help of your legal assistance officer.

Q: HOW LARGE OF AN ESTATE IS NECESSARY TO JUSTIFY A WILL? Everyone who owns any real or personal property should consider having a Will regardless of the present amount/value of his or her estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives, and other factors.

Q: WHAT HAPPENS IF I DO NOT MAKE A WILL? When you die without a Will (or die "intestate," as the law calls it) your property is distributed according to state law; you will not have any personal say as to how your property will be divided. Under state law, generally your spouse and children will take your property upon your death. If there is no spouse or children, generally your parents will take your property, then siblings, grandparents, and children of the grandparents. If no legal relation can be found, your property will eventually go to the state. Many individuals may prefer that their entire estate go to the surviving spouse and that can be designated in your Will. Most important, for mothers and fathers, however, is not always the disposition of their property after their death, but rather the proper care and custody of their minor children. Grandparents, other family members, and godparents do not automatically receive custody of children who do not have a surviving parent. Your Will should specify the individual, as well as an alternate, who you would like to designate as the guardian of your minor children. This decision, on your part, will be of great assistance to the court in determining who will receive the custody of your children. Note, however, that the decision to make a Will is strictly a personal one, dictated by your own unique financial and personal circumstances; no one can be ordered or required to have a Will.

Q: WHAT HAPPENS TO PROPERTY HELD IN THE NAMES OF BOTH HUSBAND AND WIFE? Joint bank accounts, real property, and other property held in the names of both husband and wife usually pass to the surviving spouse by law and not by the terms of your Will. However, if both spouses do not want to be listed as joint owners of property, then the Will can determine the disposition of the property.

Q: IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL? No. Life insurance is only one kind of property which a person may own. An individual usually has other assets that need to be disposed upon his or her death. Although a Will cannot change the designated beneficiaries of an insurance policy, the payment of the proceeds may be directed by a Will. For example, a Will can direct the insurance proceeds to be paid to any surviving children only when they attain a certain age. The careful person will have a lawyer and a financial planner working together on a life insurance program as one important aspect of estate planning.

Q. ARE THERE ANY SPECIAL REQUIREMENTS FOR EXECUTING A WILL? The specific requirements depend on state law. In most states, any person 18 years of age or older can execute (sign) a Will if he or she is mentally competent and is doing so as his or her voluntary act. For example, South Dakota requires a person to be over the age of 18, Louisiana permits a person to make a Will at the age of 16, while Georgia allows a person as young as 14 years of age to make a Will. Some states permit individuals younger than 18 years of age to execute a Will if they are married, economically independent, or a member of the armed forces. Thus, check with your state's laws to determine the age at which one is eligible to execute a Will. Generally, the Will must be in writing, typed and not handwritten, signed by the testator (person making the

Will), and signed in front of witnesses who are mentally competent. Most states restrict beneficiaries from also serving as witnesses, witnesses must generally be 18 years of age, and in all states, except Vermont, two witnesses are required; Vermont requires 3 witnesses. Louisiana is the only state that requires Wills to be notarized; however, notarization is recommended since it makes the document self-proving. This means that the Will is admitted into probate court without the need for gathering witnesses to appear in court or sign affidavits stating the testator/testatrix was of sound mind when he or she signed the Will.

Q: CAN I STATE FUNERAL ARRANGMENTS IN MY WILL? You may have a strong desire regarding funeral arrangements (i.e. burial at a certain location or gravesite, cremation, or military honors). However, if you elect to state your desires in your Will, do not rely on your Will alone to communicate those desires, as Wills may not be read prior to the funeral! As a practical matter, your funeral arrangements are likely to have been carried out already by the time your Will is read. Finding out, after the fact, that the arrangements were contrary to your Will may cause some dismay for your survivors. Therefore, it is recommended that you also communicate your desires to your next of kin NOW. You may also make the receipt of an inheritance contingent on the beneficiary's compliance with your burial instructions.

Q. WHO SHOULD HAVE THE ORIGINAL WILL? Store your will in a safe place that is accessible to the executor or executrix after your death. The executor or executrix will need the original Will, copies are not valid. Whether you should keep the will in your safe deposit box depends on your state law regarding access to safe deposit boxes after death. Some states make it relatively easy for family members or the executor to remove certain documents, such as Wills, life insurance policies and burial instructions, from a deceased person's safe deposit box. However, other states may require a court order to remove the will, which can take time and money. The best policy is to check with your bank's official to ensure that your executor or executrix has access to your Will upon your death.

Q: WHAT IF I STILL HAVE QUESTIONS REGARDING MY WILL? Ask them while your legal assistance officer is preparing your Will. Be sure that you convey accurately your wishes for the distribution of your property to him or her.